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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 213

TWISP MINING & SMELTING COMPANY,
A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE FIRST NATIONAL BANK, ACTING AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION, AND METHOW GOLD CORPORATION, A CORPORATION.

FOREWORD.

All references in this "Statement As To Jurisdiction On Appeal" to matters found in the "Certified Unprinted Record of the Clerk of the State Supreme Court" shall be marked (R. —).

However, since Rule 10, Para. 4 of the Rules of this Court provides:

> "Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this Court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers

as to him seem proper, and this court will receive and consider such original papers along with the usual transcript."

In conformity to that rule the Presiding Judge of the State Supreme Court has made such an order and the original exhibits, original transcript, original statement of facts, and the supplemental record, have been certified by the Clerk of the State Supreme Court, separately to the Clerk of the United States Supreme Court, as ORIGINAL RECORDS, to be returned to the Clerk of the State Supreme Court when this case is finally disposed of by this Court.

All references to such exhibits, transcript, statement of facts, or supplemental record, in this Statement As To Jursidiction On Appeal, will be made as follows: (Original Ex. No. —), (Original Tr. —), (Original St. —), and (Supp. Rec. —).

STATEMENT AS TO JURISDICTION OF THE UNITED STATES SUPREME COURT ON THIS APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal from the Supreme Court of the State of Washington, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, 43 Stat., 936, Effective May 13, 1925 (United States Judicial Code, Title 28, Section 344, provides that Section 237 (a) of the Judicial Code is amended to read as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where there is drawn in question * * * the validity of a statute of any state, on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Also, the Act of January 31, 1928, Chapter 14, 45 Stat., 54, provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America In Congress, that writs of error in causes, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Also, the Act of April 26, 1928, Chapter 440, 45 Stat., 466, amended Section 2 of the Act of January 31, 1928, to read as follows:

> "The statute regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, with mandate, shall be applicable to the appeal which the preceding section substitutes for writ of error."

B.

State Statutes, the Validity of Which Is Involved On This Appeal.

The Uniform Business Corporation Act of the State of Washington of 1933, went into full force and effect on Janu-

ary 1, 1934, and Section 3803-11, Para. 1, of Remington's Revised Statutes (Supp.), expressly provides:

> "A corporation which has been formed under this act, or a corporation which existed at the time this act took effect and of a class which might be formed under this act, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purposes and which are not repugnant to law.*" (Italics ours).

And, Section 3803-26, of Rem. Rev. Stat. (Supp.), provides:

> "Para. 1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation."

The Articles of Incorporation of the Twisp Mining & Smelting Company, appellant herein, expressly provides:

> "The powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees * * *" (R. 3).

And, Section 3803-31, Para. 3, subdivision (d), Rem. Rev. Stat., (Supp.), expressly provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

And, Article 11, Section 6, of the By-Laws of the appellant corporation, provides:

> "*A majority of the Board of Trustees,* for the time being in office, shall constitute a quorum for the transaction of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum be present" (R. 3 and 4). (Italics ours).

That By-Law expressly provides that a "*Majority of the Board of Trustees,* for the time being in office, shall constitute a quorum for the transaction of business." It does not provide that, if there are any vacancies on the Board of Seven Trustees at any time, that the minority trustees of the entire Board of Trustees have any power to transact any business of the appellant corporation.

The "Powers" of the Minority of the Board of Seven Trustees, is positively defined under Article 11, Section 5, of the By-Laws of appellant corporation, to-wit:

> "If any vacancy shall occur among the trustees by death, resignation or otherwise, the remaining trustees, by an affirmative vote of the majority thereof may elect a successor to hold office for the unexpired term of the trustee whose place shall be vacant and until the election of his successor." (See Original By-Laws on file with the clerk of this Court, under Ex. 7).

The trial Judge, held in his Memo Opinion of February 5, 1942:

> "I am compelled to conclude that the action of those purporting to constitute the Board of Trustees of the Twisp Mining & Smelting Company was legal and valid. I think this for various reasons: One of the most cogent of these reasons being that the By-Laws of the corporation provide in regard to a quorum as follows:
>
> 'A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business'.
>
> "It appears by the minutes of a meeting held August 15, 1932, that the resignation of John B. Hottel and Chas W. Julian as trustees was accepted and John Goetz and Frederick C. McDonald were elected as trustees to fill the vacancy. See Pltf's Ex. No. 7, Mr. James O. Cull • • • *testified that neither Goetz nor McDonald ever qualified nor as much as sent in*

> *anything to signify that they had accepted their appointments on the Board of Trustees.* • • • This being the situation I am constrained to hold that neither Goetz nor McDonald ever became a member of the Board of Trustees of the Twisp Mining & Smelting Company. Hence, it follows that there were only five members in office during the month of January, 1934. • • • It of course obviously follows that if there was only five trustees in office during January, 1934, then three would be a majority and hence a quorum." (See Original Statement of Facts, page 353). (Italics ours).

The Twisp Company, appellant herein, filed a motion in the trial court to re-open the case for the admission of two original exhibits, which positively refuted James O. Cull's testimony on the trial of the case, that prompted the trial judge in believing that John Goetz had never qualified as a Trustee or as the President of the Twisp Company; and shows that James O. Cull, was present at a special meeting of the Board of Seven Trustees of the appellant corporation on August 15, 1932, when the agreement as to the purchase of a block of stock by John Goetz, as arranged by James O. Cull, attorney for the Twisp Company, was duly accepted and approved by a quorum of the Board of Seven Trustees at that special meeting; and, that James O. Cull did further cause that Board of Seven Trustees to elect John Goetz as a trustee and as the President of the Twisp Mining & Smelting Company so that John Goetz could carry out the agreement that Mr. Cull had arranged and further cause the Board of Seven Trustees to direct the secretary to issue and sign certificates of the capital stock of the Twisp Company, at the request of John Goetz, in the name of John B. Hottel and send said certificates to John Goetz for his signature as President of the Twisp Company and for delivery to John B. Hottel (R. 5 and 6).

Attached to that motion to re-open was a photostatic copy of one of the certificates of stock that was signed by John Goetz, as President of the Twisp Company of the date of August 16, 1932, and a photostatic copy of a letter of James O. Cull of the date of August 21, 1932. (St. A. I-16).

On the hearing of this Motion to Re-Open the case, appellant offered in evidence the Original certificate of stock bearing John Goetz's signature of the date of August 16, 1932, as President of the Twisp Company, and also the Original letter of James O. Cull of the date of August 21, 1932, and which, so far as material, stated:

> "My dear Magney,—Congratulations upon your new office of Vice-President of the Twisp Mining & Smelting Company. * * * At the Trustees meeting, Monday, we accepted the resignations of Hottel and Julian, *and elected Goetz and McDonald members of the Board.* We elected you as Vice-President, in the place of Hottel, and C. M. Hull as treasurer. Simonds remains as Secretary; *and Mr. Goetz was elected as President, in place of Sawbridge, who resigned as President, but not as trustee.* * * * The Armstrong Company and Smith, have agreed to the settlement; and Gillette's clients, in three cases, and Hull and Johnson's client, Mann, has refused settlement, and say they will proceed with the litigation. *I have written Mr. Goetz, asking his attitude and wishes; because he said we would proceed and litigate with them, and either settle in the end or defeat them.* * * * Yours very truly, James O. Cull." (Italics ours).

The trial Judge rejected said "Original Certificate" and "Original Letter of James O. Cull" (Ex. 63), and entered an order denying appellant's motion to re-open the case for that written confession of James O. Cull that his testimony on the trial that John Goetz never qualified as a "Trustee", or as "President", or as much as sent in anything to signify that he had accepted his appointment as "Trustee" or as "President", was not true. (See Tr. 136 and St. 353).

That ruling of the trial court was assigned as error to the State Supreme Court (R. 19), but the State Supreme Court never passed on that reversible error of the trial court and arbitrarily said:

> "We are satisfied that neither Mr. Goetz nor MacDonald were trustees of Twisp on January 17 or 30, 1934. They had never qualified as trustees, and their offices had been declared vacant." (R. 35).

The record shows that the appointments of Goetz and McDonald as trustees were never declared vacant, to-wit: On direct examination of Mr. Cull, he testified: "Q. Was anything done to declare those appointments void up until January 17, 1934? A. No, I am sure there never was any formal declaration of the fact." (St. 25, Original Statement of Facts).

Therefore, it is a settled fact that on January 17th and 30th, 1934, there were at least six trustees in office, namely, John C. Sawbridge, W. V. Coons, C. M. Hull, Harold Simonds, Roy K. Magney, and John Goetz, and only three were present on either date. Three trustees, of a Board of Seven Trustees, does not constitute a quorum. Even under the erroneous theory of the State Supreme Court that the majority of the trustees then in office constituted a quorum, three trustees do not constitute a quorum of the Six trustees then in office. The ruling of the trial court and the affirmance thereof by the State Supreme Court constitutes a plain denial to the appellant of a hearing on the merits of its Constitutional rights both State and Federal, under the ruling in *Powell* v. *Alabama*, 287, U. S. 45 at 68, 69, 77 ed. 158, 84 A. L. R. 527, where the court held:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would

be a denial of a hearing, and, therefore of due process in the constitutional sense."

And the trial Judge, on February 25, 1942, filed a Supplemental Opinion, and said:

"Now we come down to, and I will take up the discussion of the validity of that deed. *As I said before, that thing has been a regular headache to me.* There is no principles underlying that controversy; it is just a matter of statutory construction, but in view of the fact that the Uniform Business Corporation Act of 1933, as it appears in section 31, Laws of 1933, Chapter 185, reads: "*except as otherwise prescribed in the Articles or By-Laws.*" therefore, without further discussion, I will say that I will let my memorandum decision heretofore written, stand on that point, and I will conclude that there was a quorum on January 30, 1934, and that such quorum authorized the quit claim deed." (See Original Statement of Facts, pp. 366, 367). (Italics ours).

He overlooked the fact that the Articles of Incorporation prescribe a Board of Seven Trustees, and the statute provides that there must be a majority of that board, or four trustees, to constitute a quorum to transact business. There could not be a different board prescribed by any By-Law for that is inconsistent with the Articles of Incorporation and the law on the subject.

The foregoing ruling of the trial Judge was assigned as error on the appeal of this cause to the State Supreme Court, and in passing on said error the Supreme Court in its opinion said:

"It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trus-

> tees, *for the time being in office,* shall constitute a quorum for the transaction of business." (R. 35).

And, appellant cited Fletcher's Cyc., on Corporations, Vol. 2, page 206, Section 421, providing: •

> "The general • • • rule being the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is the majority of the entire board, notwithstanding there may be vacancies on the board at the time." Citing Hotaling *v.* Hotaling (Cal.), 224 Pac. 435, as authority.

But, the State Supreme Court further said:

> "The next reference to Fletcher's Cyc., on Corporations is vol. 2, page 206, section 421, from which appellant quotes. This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide 'that a majority of the directors shall be necessary to constitute a quorum,' not a majority of the trustees then in office, as in the instant case" (R. 38).

Manifestly, the State Supreme Court did not construe Section 6 of Article 11, of the By-Laws as written, but on the contrary arbitrarily left out the words "Board of" and enacted a new By-Law, which it had no lawful power to do, that would provide:

> "A majority of the trustees then in office, shall constitute a quorum for the transaction of business of the Twisp Mining & Smelting Company."

The State Supreme Court in its opinion (R. 37), said:

> "Appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc., on Corporations, Vol. 2, p. 168, Sec. 392, is that when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as

a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states that the rule and the reasons therefore are well stated in Ames *v.* Goldfield Merger Mines Co., 227 Fed. 292. We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here. The meetings of January 17 and 30, 1934, were regularly called meetings. The directors met as a board, and a quorum of the directors *then in office being present,* proceeded as a board to transact the business of the corporation, referred to in the notice given of such meetings."

However, Article 11, Section 1 of the By-Laws of the Twisp Company, expressly provides:

> "The trustees shall act only as a board, and the individual trustee shall have no power as such" (R. 3).

And, Article 11, Section 5 of the By-Laws of the Twisp Company, expressly provides:

> "The Secretary shall give notice of each special meeting" (of the Board of Trustees) "by mail, the same to be at least two days before the meeting * * * to each trustee" (R. 4).

In *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, the court held:

> "Unless notice be given to each director, as required by by-laws of the corporation, the meeting is illegal, and action is not binding."

In *Enright, as Trustee in Bankruptcy* v. *Becksher,* 240 F. (2d C. C. A.), 963, the court held:

> "It seems from the minutes that there was five directors present, but Mr. Munford was interested in this transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it

would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four directors present, and nine was required, it seems clear there would have been no meeting at the time the action was taken, therefore there could be no finding by the directors, as required by section 49 of the Corporation Act or law, that the value of the property transferred was equal to the value of the stock issued." The resolution (passed at that meeting) was held to be a nullity.

The record in this instant case shows that Mr. Cull testified as follows:

> *"I didn't send out formal notices for the January 17th meeting.* When Mr. Cole called attention to that we sent out notices and called a meeting for the 30th." (R. 6) (Italics ours).

The record further shows:

> "At said meeting, according to the testimony of Mr. Cull, Mr. Strong and James Cole, his personal attorney, were present, and Mr. Cole raised the question as to whether proper notice of this meeting had been given. Thereupon it was decided by those present to call a new meeting on January 30, 1934, so as to enable the Secretary to give proper notice, which was 8 days prior to the meeting. Notices were mailed to the trustees whom Mr. Cull considered as directors, but the notice to Roy K. Magney was not mailed out until January 24, 1934. * * * I" (Mr. Cull) *"did not send notices to MacDonald or Goetz."* (R. 9) (Italics ours.)

It is clear from Mr. Cull's own admissions, that the purported special meeting of the Board of Seven Trustees of January 17th, 1934, was not legally called, and those who were present admitted that fact and of necessity under such circumstances the pretended resolution passed at that time was an absolute nullity (R. 6).

The Chelan Mining Company, one of the appellees herein, was incorporated on January 26, 1934, and Robert H. Strong, James Cole and James O. Cull were named as the initial directors of a board of five directors; and on January 29, 1934, the initial organization meeting was held and Robert H. Strong was elected as President and James Cole and James O. Cull were elected as assistant secretaries; and Robert H. Strong, as president of the Chelan Mining Company, was duly authorized to proceed in the name of the Chelan Mining Company to obtain a transfer of the property and property rights of the Twisp Mining & Smelting Company (R. 9).

The record (R. 9 & 10), further shows:

> "On January 30, 1934, only three trustees of the appellant company appeared, John C. Sawbridge, C. M. Hull and W. V. Coons. At this meeting, James O. Cull, was elected as Secretary pro tem, and Robert H. Strong and James Cole, president and assistant secretary of the Chelan Mining Company were present."
>
> "At this meeting, the three trustees present, upon the advice of Mr. Cull, decided that John Goetz and Frederick C. MacDonald had failed to qualify as trustees and had decided not to fill the vacancies, but to treat the Board, as a Board of Five members and proceeded to readopt the purported resolution passed by the same three trustees on January 17, 1934 (R. 7 & 8). (Also see Original minutes of trustees' meeting of January 30, 1934, in Original Exhibit 7.)

The State Supreme Court in its opinion (R. 38), said:

> "A careful study of Fletcher will, in our opinion, reveal that the text recognizes that the number of directors of a corporation necessary to constitute a quorum may be fixed by the by-laws, if not incompatible with the articles or statutory law, and that a majority of that quorum may decide any question coming properly before such meeting, although the number of directors

present may be less than a majority of the entire board. Fletcher's Cyc., on Corporations, vol. 2, p. 210, sec. 425. See, also, 13 Am. Jur. 918, sec. 960, where the rule is stated as follows:

'Stating the rule in terms of necessity, it is equally well settled that a majority of the directors must be present at the meeting to constitute a quorum and enable the board to act and bind the corporation, *unless the power is given to a lesser number.* This is also the rule embodies in the Uniform Business Corporation Act.'" (Italics ours.)

"The authority cited by appellant does not purport to deal with a corporation which has a by-law such as we have in the instant case, and a discussion of such authorities would therefore serve no purpose. Having determined as a fact that there were but five trustees in office on January 17 and 30, 1934, whether or not a majority of that five constitutes a quorum is dependent entirely upon the interpretation of the section of the by-laws heretofore referred to, considered in connection with the articles and the statutory law. Having been cited to no authority that would prohibit a corporation from passing such a by-law, under conditions such as herein set out, we are of the opinion it was valid, and that the three directors, present and voting at the meeting of January 17, and 30, 1934, constituted a majority of the board then in office, that their acts were the valid acts of the board, and that the deed issued pursuant to the resolution adopted at the meeting of January 30, was a valid deed of the corporation."

The State Supreme Court was led into error by reason of the fact, as it stated (R. 37), that the special meeting of the Board of Seven Trustees of the Twisp Company was a regular called meeting, in view of Mr. Cull's own testimony (R. 6) that no formal notices as required by article 11, section 5 of the by-laws of the Twisp Company was ever given to each trustee and by the further fact that Mr. Cull who

sent out the notices for the special meeting of the Board of Seven Trustees of January 30, 1934, did not mail the notice to Roy K. Magney, one of the trustees, 8 days prior to January 30, 1934, as required by the resolution at the pretended special meeting of January 17, 1934, and did not send any notice to John Goetz who manifestly was a member of the Board of Seven Trustees of the Twisp Company.

The Court assumes under that state of facts that the pretended special meetings of the Board of Seven Trustees of January 17 and 30, 1934 were regularly called meetings; and further erred in assuming that under such a state of facts there was any valid resolution passed by the three minority trustees on Janury 17, 1934 or January 30, 1934; and in further assuming that there ever was any effective authorization by the Board of Seven Trustees of the Twisp Company, in whom was vested the sole power to give such authorization, to execute a quit claim deed of all the assets of the Twisp Mining & Smelting Company. (See *Hotaling* v. *Hotaling* (Cal.), 224 Pac. 435), for the reason stated in *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, to-wit:

> "Unless notice be given to each director, as required by by-laws of the corporation, the meeting is illegal, and action taken is not binding."

The fallacy of the State Supreme Court's interpretation of the effect of the by-law as stated in article 11, section 6 of the by-laws of the appellant corporation, which provides:

> **"A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business."**

is determined by Section 3803-26 of Rem. Rev. Stat. (Supp.) of the Uniform Business Corporation Act of 1933, which provides:

"1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or articles of incorporation."

Fletcher's Cyc., on Corporations (Permanent Edition) Vol. 5, p. 69, Section 3013, provides:

"A by-law providing what shall constitute a quorum is invalid and yields to the statute * * *"

Fletcher's Cyc., on Corporations (Permanent Edition) Vol. 8, p. 723, Section 4190, provides:

"By-laws, to be valid, must be consistent with the terms and spirit of the charter of the corporation * * * A by-law which is not thus consistent with the charter, but in conflict with and repugnant to it is void."

In *Gentry-Futch Co.* v. *Gentry* (Florida) 106 So. 473, the court in a case, where a by-law of a corporation provided that no business should be transacted at any meeting without there being 75 per cent of the stock represented, held:

"This provision of the by-laws is void, being in conflict with section 4082 of the Revised General statutes of 1920, which reads: 'A majority of the stock shall constitute a quorum at stockholders' meetings.' This announced a general statutory policy and principle which, of course, cannot be changed by a corporate by-law."

And under the Uniform Business Corporation Act, Sections 3803-37 & 3803-38 of Rem. Rev. Stat. (Supp.), the Articles of Incorporation can only be changed by a resolution of the Stockholders, in the manner provided by those statutes. *In re Dolgeville Electric Light & Power Co.*, 160 N. Y. 500, 55 N. E. 287, the court holds that the Board of Trustees as fixed by the Articles of Incorporation cannot be changed unless the statute regarding amendments have

been fully complied with, which was not done in this instant case.

The State Supreme Court in its opinion states:

> "After the conveyance by Mr. Strong and wife to Chelan Mining Company, that company issued to Twisp Company 250,000 shares of its stock, which were delivered to Mr. Cull and receipted for by him. *Twisp still holds this stock.*" (R. 29 & 30). (Italics ours.)

The court in making this statement, overlooked the fact conclusively shown by the record, that at that time Mr. Cull was attorney for Mr. Strong and the Chelan Mining Company and was also Assistant Secretary, Trustee, and local manager of that concern. It is obvious that Mr. Cull in thus causing a certificate in the Chelan Company to be issued in the Twisp Company and then holding it himself for a period of more than five years, did not constitute a delivery of the same to appellant company.

Mr. Cull's testimony shows that he received the certificate of stock on February 6, 1934, and that he held the certificate until April 5, 1939, at which time he told Mr. Blaesser and Mr. Magney he had the certificate. The new Board of Seven Trustees, of appellant company refused to accept it, and he still held the certificate at the time of the trial of the case in the Superior Court of Okanogan County, State of Washington, during the month of October, 1941 (R. 10 & 11).

By reason of that fact, the purported transaction of Robert H. Strong with the minority trustees on January 30, 1934, was never consummated. On April 24, 1939, the new Board of Seven Trustees repudiated the illegal transaction and disavowed the entire transaction (R. 12).

The Opinion of the State Supreme Court (R. 15 to 43), was filed on January 18, 1943; and the appellant, within the time allowed by the rules of the Court, duly filed with the

State Supreme Court its printed Petition and Supplemental Petition for a rehearing before the entire Supreme Court and contended as follows:

> "The Departmental decision substantially held that the by-laws of a corporation are on a higher plane than the articles of incorporation themselves. In order to reach the conclusion that the Department did reach, it is necessary for them to give full force to a by-law that was entirely contradictory to and inconsistent with the articles of incorporation. This was done without any citation of authorities and without any discussion as to whether or not the two were inconsistent, and if this decision is allowed to stand, it will revolutionize corporation law in this State and create a situation where no stockholder of a corporation may rely on the articles of incorporation themselves for his protection, but on the contrary, he will be subject to the whim and caprice of any Board of Directros which may see fit to change or alter the by-laws of the corporation from time to time. It is a matter of importance, far greater than this case itself. The case involves only the parties primarily interested therein, but the principle of law which the Department by its decision, will nullify the effect of the charter or articles of incorporation of any company organized under the laws of this state. The members of a corporation have a constitutional right to rely on the charter of the company being given full force and effect. The United States Constitution guarantees them that right. It is true they may be amended by the procedure specified for that purpose, *but they may not be amended by the legislature or by a court under the guise of judicial construction.* • • • (Italics ours.)
>
> "The Department in this instant case, construed, applied and enforced Article 11, Section 6 of the by-laws of the Twisp Company, as a law, which superseded and nullified the provisions of the Uniform Business Corporation Act in regard to what constituted a legal

quorum of a Board of Seven Trustees and as so construed, applied and enforced was repugnant to the Fourteenth Amendment of the Federal Constitution."

And further contended:

"The Departmental Opinion, after holding that there was a quorum present at the meeting of January 30, 1934, goes on to further assert that even if that meeting were not a valid meeting, appellant is estopped to question the rights of the respondents. In so holding, it seems to us that the Department has entirely ignored one of the principal elements of estoppel." (See Printed Supplemental Petition, which is attached to this Statement As To JURISDICTION ON APPEAL AND MARKED: "Appendix to Statement as to Jurisdiction on Appeal".)

And the State Supreme Court considered said Petition and Supplemental Petition and adhered to its Opinion of January 18, 1943, and on March 26, 1943, without writing any further opinion, entered an order which provides:

"The court having considered the appellant's petition and supplemental petition for a rehearing herein,

"IT IS ORDERED that the petitions be and they hereby are denied" (R. 44).

C.

Date of Judgment and Date of Application for Appeal.

The judgment of the State Supreme Court sought to be reviewed was entered on March 29, 1943 (R. 45).

The application for an order allowing the appeal was presented to the Chief Justice of the State Supreme Court on May 29th, 1943, and the order allowing the appeal was signed by the Chief Justice of the State Supreme Court on May 29th, 1943, and duly lodged on that same day with the

Clerk of the State Supreme Court for transportation to the Clerk of the United States Supreme Court (R. 53).

D.

Grounds Upon Which It Is Contended That Questions Involved Are Substantial.

This action was brought to recover real property and quiet title by removing the cloud of a deed, wrongfully made in the name of the Twisp Mining & Smelting Company by individuals, pretending to be the president and assistant secretary of the Twisp Company without authority or consideration moving to the Twisp Company, of date of January 31, 1934 (Ex. 20, herein), all of which facts were known to Robert H. Strong the vendee in said quit claim deed at the time he received the deed (R. 9).

Exhibit 20, shows on its face, that the property and property rights that are purported to be conveyed by said quit claim deed consisted of homestead lands, recorded in Book 76, of Deeds, page 416, on June 27, 1932; unpatented mining claims, recorded in Book 76, of Deeds, page 417, on June 27, 1932; and the assignment of an executory sale contract of three patented mining claims, by the Alder Group Mining & Smelting Company, as vendor, and the Twisp Mining & Smelting Company, as vendee by said assignment recorded in Volume 9 of Miscellaneous Records on June 27, 1932 and as further shown by the Original Exhibits Nos. 4, 5, 6, 6A & 6B, which are filed in the Clerk's office of this Court for inspection if desired by order of the State Supreme Court. All of the appellees base their pretended rights to the property and property rights on the purported rights that Robert H. Strong obtained by reason of the quit claim deed made in the name of the Twisp Mining & Smelting Company, Exhibit 20, of date of January 31, 1934.

It is settled, by the State Supreme Court in *Hutchinson Realty Co.* v. *Hutchinson*, 136 Wash. 184, 239 Pac. 388, that this instant action is not an action predicated on fraud, but is simply an action to try title to real property (Sections 785 & 786, Rem. Rev. Statutes), wherein "the superior title whether legal or equitable shall prevail." This action was commenced on May 7, 1940, within the seven year period, from January 31, 1934, the date of the purported deed, under Section 793, Rem. Rev. Stat.

The State Supreme Court in its opinion, says:

> "Appellant contends that the acts of the three directors were ultra vires, and therefore void, and being void, such acts could not be ratified or the company estopped from questioning the validity of the deed." (R. 40). And further says: "In the first place, the acts of the three directors in passing the resolution of January 30, 1934, and the execution of the deed were not acts ultra vires the corporation, for clearly the corporation was not prohibited from passing such resolution or from executing such a deed. The term 'ultra vires', in so far as it applies to corporate transactions which are outside the objects for which the corporation was created, as defined in the law of its organization, and therefore beyond the power conferred on the corporation by the legislature."

It is undisputed in this instant case, that during the month of January, 1934, that the Board of Trustees of the Twisp Company was a Board of Seven Trustees, because even the State Supreme Court in its opinion, says:

> "It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees." (R. 35).
>
> "We are satisfied that neither Mr. Goetz nor Mr. MacDonald were trustees of Twisp on January 17, or 30, 1934. They had never qualified, and their offices had been declared vacant. This being true, there were

on January 17 and 30, 1934, only five trustees of Twisp who were qualified to act, namely, Mr. Sawbridge, Mr. Coons, Mr. Hull, Mr. Simonds, and Roy Magney • • • " (R. 35, 36).

That is to say, that the Board of the Twisp Company was a Board of Seven Trustees on January 17 and 30, 1934, but there were two vacancies on that Board of Seven Trustees and that only five members were qualified to act, and Mr. Simonds and Mr. Roy Magney were not present, and the State Supreme Court of necessity then admits that there were only three trustees of the Board of Seven Trustees present on January 17 or 30, 1934, and three trustees did not constitute a legal quorum of the board of seven trustees of the Twisp Company.

Fletcher's Cyc., on Corporations, Vol. 3, pages 3044 to 3047, provides:

> "It is the board duly convened and acting as a board that is made the representatives of the corporation. The assent of determinations of members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and consult with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the members attended by at least a majority of its members. The governing body of a corporation, as such, are agents of the corporation only as a board and not individually. Hence it follows they have no authority to act, save when assembled at a board meeting. The separate action, individually, of a person composing such governing body, is not the action of the constituted body of men clothed with corporate powers."

In *Kent* v. *R. M. Co.*, 78 N. Y. 179, the court held:

> "The By-Laws of a corporation are only rules and regulations as to the manner in which a corporation's

power shall be exercised. *Any attempt on the part of the defendants, by By-Laws or otherwise to deprive an unconsenting stockholder of the right secured to him by corporate articles is in excess of defendant's authority, or in legal parlance, ULTRA VIRES.*" (Italics ours.)

In *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24 to 61, 35 Law Ed. 55 to 68, the court in passing on this important question held:

"The views which this Court has taken of the question presented by this branch of the case and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. Where a corporation is acting within the general scope of the power conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are requisites to its existence or to its action, because such requisites might in fact have been complied with. *But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.* (Italics ours).

A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corpo-

> ration by the laws of its creation, is incapable of making it, the courts while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensated for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failure to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The Uniform Business Corporation Act, expressly granted the Twisp Company a constitutional right to fix the number of trustees that was to constitute its board of trustees and the Twisp Company by reason of the power so granted by the legislature fixed its board, as a Board of Seven Trustees. It is true that the stockholders may have its articles of incorporation amended by procedure specified under sections 3803-37 and 3803-38 of Rem. Rev. Stat. (Supp.), but the articles of incorporation may not be amended by a court under the guise of judicial construction, or by by-law, which is inconsistent with the articles of incorporation.

In *Bergman* v. *St. Paul Mut. Bldg. Assn.* (Minn.), 13 N. W. 120, the court held:

> "The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles and not to subvert the law of corporate existence." Also see Morewitz, Private Corporations, Sections 367, 368.

It is clear then, that the State Supreme Court, in construing, applying, and enforcing Article 11, Section 6 of the By-Laws of the Twisp Company, as a law; which

superseded and nullified the provisions of the Charter of the Twisp Company and the provisions of the Uniform Business Corporation Act in regard to what constituted a quorum of the Board of Seven Trustees; has placed a construction, application, and enforcement of that by-law as a law, which is repugnant to the Fourteenth Amendment of the Federal Constitution; and has abridged and cut off the protection of the stockholders of the Twisp Company provided under the Uniform Business Corporation Act, and in so doing has in fact denied the Twisp Company a hearing on the merits of its appeal.

These three minority trustees had no power or authority to amend the articles of incorporation of the Twisp Company, and under the foregoing authorities their attempt to so do did not constitute a corporate act and their unlawful attempt to do so was in excess of their power and authority and was in legal parlance, ultra vires.

In *Jarshe* v. *Farmers & Merchants State Bank* (N. H.), 206 N. W. 773, the court held:

> "Where * * *, the contract is illegal and void, as we have held the one here to be, no estoppel can be raised. * * * Counsel further argues that the plaintiff was an ignorant, unlettered man, who relied upon the honesty and good faith of those with whom he dealt; that he did not know the contract was ultra vires and unlawful. But plaintiff when he entered into the contract, whatever his ignorance or actual knowledge of the law, was charged with the knowledge of the law."

And, in this instant case, Mr. Strong, was not an ignorant person. He was present at the pretended meetings of January 17, 1934, with his own attorney Mr. Cole (R. 9) and likewise was present at the pretended meeting on January 30, 1934 (R. 9, 10), and knew all the facts and is in no position to claim he was deceived.

In *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, the court held:

> "The board of directors of this corporation consisted of seven. * * * Three directors met at a special meeting. By resolution unanimously adopted these minority directors authorized the President of the corporation to file an answer in receivership cause instituted against it by complainant. There were four vacancies on the board. These vacancies could have been easily filled. * * * The fact is they filled no vacancies. * * * I am therefore of the opinion that there being no quorum of the board of directors at the meeting which assumed to authorize the filing of the answer in this case, the answer filed by the president is not the answer of the corporation."

In *Hotaling* v. *Hotaling* (Cal.) 224 Pac. 435, the court held:

> "Under the statute it required a majority of the board shall constitute a quorum. The articles provided that nine shall compose the Board of directors. Five met at a meeting, but one was interested because the deed to be executed was to transfer certain property of the corporation to one of the five directors present. By the resolution adopted by the remaining four the president and secretary were authorized to execute a deed of conveyance to Richard M. Hotaling, one of the members of the board present, of real estate belonging to the corporation. The deed was executed and recorded. The question of the validity and effect of the deed formed the subject-matter of this action. The trial court held that the deed was void and the appellate court affirmed the trial court's ruling, and in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the sole power to give such authority.' We con-

clude that there was not a quorum of said directors capable of authorizing the execution of the deed, and that the grantees in such deed are estopped to claim any right or title to the property purported to be conveyed by such a deed."

The State Supreme Court in its opinion (R. 19) admits that one of the assignments of error raised by the appellant was that the trial court erred:

> "In holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong, with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed."

It is manifest under the foregoing showing, that a deed made in the name of appellant by persons who were never effectively authorized by the Board of Seven Trustees of the Twisp Company, in whom was vested the sole power to give such authority, did not constitute the genuine deed of the Twisp Company and of necessity then, it was a forged quit claim deed and the State Supreme Court manifestly erred in not so holding.

In *Almo Trust Co.* v. *Cunningham* (Tex.) 203 S. W. 1105, the court held:

> "Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

In *Lewis* v. *Kuyawa,* 158 Wash. 607, 617, 291 Pac. 1105, the court held:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he

may be of the forgery or how much of value he may have parted with in reliance on the genuineness of the instrument, cannot claim protection against the rightful owner. As some courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

CASES WHICH APPELLANT BELIEVES SUSTAIN THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON THIS APPEAL ARE AS FOLLOWS:

In *Bryan* v. *Zimmerman*, 278 U. S. 63, 73 Law Ed. 184, this Court held:

> "There are various ways in which the validity of a state statute may be drawn in question on the grounds it is repugnant to the United States Constitution. No particular form of words or ph-ases is essential, but only that the claim of invalidity and the grounds therefore be brought to the attention of the State Court with fair precision in due time. And if the record as a whole shows either expressly or by clear intentment that this was presented. Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The Fourteenth Amendment to the Constitution of the United States, reads as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In *Mooney* v. *Holohan*, 294 U. S. 103, 79 Law Ed. 791, the court held:

"That Amendment governs any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers."

In *Pothier* v. *Rodman,* 261 U. S. 307, 311, 67 Law Ed. 670, 672, this Court held that grounds for an appeal to the United States Supreme Court exists:

"In any case in which the Constitution or laws of a State is claimed to be repugnant or in contravention of the United States Constitution."

In *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 717, 67 Law Ed. 1194, 1199, this Court held:

"The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous and the motion to dismiss the writ of error is accordingly denied."

In *Almo Lovell* v. *Griffin,* 343 U. S. 444, 453, 82 Law Ed. 949, this Court held:

"An objection to the validity of a municipal ordinance prohibiting the distribution, without permit, of circulars, handbooks, advertising, or literature of any kind, that such ordinance violated the Fifth and Fourteenth Amendment to the Federal Constitution by abridging the freedom of the press and prohibited the free exercise of petitioner's religion, and practice thereof by prohibiting the distribution of literature about the plaintiff's religion, in violation of the terms of the amendments, is sufficient. *Whether a Federal question was adequately presented and decided in the State Court is itself a Federal question."* (Italics ours.)

In *Lawrence* v. *Tax Commission,* 286 U. S. 276, 282, 76 Law Ed. 1102, 1106, this Court held:

"The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judi-

cially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus denied."

In *Davis* v. *Wechsler*, 263 U. S. 22, 24, 68 Law Ed. 143, 145, this Court held:

"We are of the opinion that the judgment must be reversed. Whatever springs the state may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The State Courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. Ward *v.* Love County, 253 U. S. 17, 22, 64 Law Ed. 751, 758, 40 Supt. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even under local grounds. * * * This is familiar as to the substantive law, and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obsticles in the way."

In *Fiske* v. *Kansas*, 274 U. S. 380, 385, 71 Law Ed. 1108, this Court held:

"A decision of a State Court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore, reviewable by writ of error under Section

237 of the Judicial Code. * * * And this Court will review the findings of fact by the State Court where a Federal right has been denied as to the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

STATUS OF RECEIVER AND METHOW GOLD CORPORATION.

The "Receiver" was appointed by the Superior Court of Spokane County, under a Special Statutory Power of Section 3803-53, Para. 1, Subdivision (c), of the Uniform Business Corporation Act, Rem. Rev. Stat., (Supp.), of the State of Washington, which provides:

> "The Court may appoint a liquidating receiver or receivers (c) upon the filing of a petition for involuntary proceedings for dissolution, but only after process has been issued against the corporation and any other defendants named in the petition and after the filing of answers admitting the allegations of the petition, or after proof of such allegations if the same are not admitted" (R. 12).

And Section 3803-54, Para. 1, of Rem. Rev. Stat., (Supp.), further provides:

> "The receiver or receivers as provided in the last preceding section, shall, after giving such bond as the court may require for the faithful performance of his or their duties proceed with the liquidation of the affairs of the corporation in such manner as the court shall direct."

It appears, from Exhibit 57 (R. 12), being a certified copy of the proceedings in that receivership action brought in the Superior Court of Spokane County, State of Washington, on February 3, 1939, case entitled W. E. Gamble, plaintiff, v. Alder Group Mining & Smelting Company, and Rob-

ert S. Lewis and Fred B. Morrill, surviving members of the Board of Directors, defendants, case No. 102,961, that said defendants appeared and contested the appointment of a liquidating receiver on the grounds that said surviving members had on January 23, 1939, entered into a 99-year lease, of the lands in ouestion herein, including the three patented mining claims, with Mahlon McCain and Chas. W. Gillespie, but the Alder Group Mining & Smelting Company had sold these three patented mining claims to John L. Magney, on an executory sale contract (Ex. 4) of date November 23, 1927, which contract was duly assigned to the Twisp Mining & Smelting Company, as vendee, on July 12, 1932. (R. 12) Mr. Gillespie admitted (St. 279):

> "I will admit I was associated with Mr. Morrill at the time and that Mr. Morrill showed me Judge Huneke's memorandum opinion."

Said Memo Opinion, dated March 31, 1939, provided:

> "The pleadings in this case show that the name of the defendant corporation was stricken from the rolls by the Secretary of State on July 1, 1922, for non-payment of its license fees and that three years later, viz., on July 1, 1925, this corporation was automatically dissolved under the law. Under Section 14, as above stated, it could be re-instated, however, at any time within ten years after July 1, 1925, but this was not done. We therefore have a defunct corporation, dead for more than 13 years, now answering that it has entered into a long time lease of its properties, which lease has been assigned to a third party which will work its properties and return profits to the company. And under the statute all the trustees of such corporation can do is to *'hold the title to property of such corporation for the benefit of its creditors and stockholders to be disposed of under appropriate court proceedings.' HENCE ANY AND ALL ACTIVITIES ALLEGED IN THE ANSWER MUST BE VOID."* (Italics ours.)

And on May 18, 1939, the Receiver was appointed as a liquidating Receiver, by that Superior Court, under the power and authority of the above statutory provision and in doing so the court was acting under a limited jurisdiction and not as a court of general jurisdiction.

Fred B. Morrill then filed a claim for attorney fees for preparing and procuring the so-called lease and trial court denied his claim, and he appealed to the Supreme Court and this Receiver contested his claim in the Supreme Court in the case entitled W. E. Gamble, plaintiff, v. Alder Group Mining & Smelting Company et al., defendants. Fred B. Morrill, appellant, v. Seattle-First National Bank, Spokane & Eastern Division, as Receiver, Case No. 27981, 5 Wash. (2d) 578, 105 Pac. (2d) 811, and the Supreme Court held:

> "From the order appointing the receiver, no appeal was taken, and that order became final. * * *. The corporation, being in the condition it was, had no power to transact new business. * * *. Since it was the duty of the appellant and his associate director to refrain from engaging in any new business, it would seem evident that the appellant would not be entitled to compensation for doing something, which, under the law, it was his duty not to do."

And the record herein, shows: That a *Lis Pendens* of the Receivership action was filed in Okanogan County, State of Washington, on February 23, 1939, and further shows that the Methow Gold Corporation did not file the lease (Ex. 12) nor the assignment of same (Ex. 15) for record until March 8, 1939 (R. 11 & 12).

In *Ellis* v. *McCoy*, 99 Wash. 457, 169 Pac. 973, the court held:

> "He (appellant) calls attention to the concluding clause of the statute, the clause to the effect that a subsequent purchaser or encumbrancer is bound by the proceedings subsequent to the filing of the notice of

pendancy of the action only to the extent he would have been bound if he was a party to the action, and argues that has he appeared and set up his claim, the court would have given judgment, not against him, but against the Roots only, and hence the judgment can have no more effect, inasmuch as he was not a party. But we cannot think this the meaning of the statute. *We think that he is bound by the judgment actually entered to the extent as if he was a party to the action.* The question therefore is not, would the court have entered a different judgment had he been a party to the action, but, to what extent would he have been bound by the judgment actually entered had he been such party."

The Methow Gold Corporation is therefore bound by the adjudication in the receivership action, that the lease (Ex. 12) and the assignment (Ex. 15) were void from their inception and since the Methow Gold Corporation alleged in its amended answer (Tr. 100) that it bases its rights under that void indenture of lease and assignment thereof, it has no standing in this case, other than a willful trespasser on appellant's lands.

In *Wapes* v. *Sergeant,* 120 Wash. 63, 206 Pac. 945, the court held:

"When the corporation was formed, Sergeant undertook to assign to it this contract" (An executory sale contract) "and it obtained just such rights in this property as Sergeant had to give, and when the corporation went into the hand- of the receiver, the latter received just such rights in this property as the corporation had. If Sergeant was the owner of this contract, he would have the right, until such time as a forfeiture had been properly declared, to cut the timber, saw it into lumber, sell it and pay $3.00 per thousand feet from the sale price to these appellants, until the whole of the balance had been paid. *In our opinion, the receiver is not the unqualified owner of the property, and*

had no right to undertake to sell and convey an unencumbered unconditional title to it.''

Also see *State ex rel. Oatey Orchard Company* v. *Superior Court,* 154 Wash. 101 12, 280 Pac. 351, holding that the vendee in an executory sale contract of land has the exclusive possession of said land.

In *Ranson* v. *Williams,* 2 Wall 313, 17 Law ed. 803, that court held:

> ''The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a court of general jurisdiction, because no authority derived by law can transcend the source from which it came; and the principle that a limited authority must appear to have been strictly construed even when the acts of a Superior Court are in question, is well settled.''

In *Murry* v. *American Surety Co.,* 70 Fed. (9th C. C. A.) 341, the court in passing on the same question said:

> ''The fact that the superior court is a court of general jurisdiction did not give it power to appoint a receiver without any authority of statute under which it was acting. * * *. In whatever light this question may be viewed, we are brought directly face to face with the unquestionable rule of law in all special statutory proceedings the measure of the court's power is the statute itself.'' Also See, Valley, as Trustee *v.* N. F. & M. Ins. Co., 254 U. S. 348, 65 Law ed. 297.

This executory sale contract (Ex. 4) was assigned to the Twisp Company, prior to John Sawbridge's death. The Alder Group Mining & Smelting Company, vendor therein, had knowledge of that fact during the summer of 1932 and

the Receiver had knowledge of that fact from the records, where said contract was recorded on June 27, 1932 (R. 4). No forfeiture was ever claimed against the Twisp M. & S. Company (R. 4-5). All that the Receiver obtained to the Three Patented Mining Claims, was the right to enforce the terms of the executory sale contract, that was possessed by the Alder Group Mining & Smelting Company, but this Receiver unlawfully ignored the rights of the Twisp Company and wholly without power or authority entered into an illegal agreement with the Methow Gold Corporation on July 27, 1939, to prevent the Twisp Company from performing its executory sale contract and illegally gave the Methow Gold Corporation its consent to wilfully trespass on said lands that rightfully belonged to the Twisp Company (R. 11 to 13).

Under that illegal agreement, the Methow Gold Corporation mined ore, and removed ore from the premises and sold more than $350,000.00 worth of ore from the premises and has made no account for same and appellant is seeking an accounting from all the appellees for the ore unlawfully sold from said premises, which was mined, removed and sold without the consent of the Twisp Company. See *Fordney, as Executrix*, v. *King County*, 9 Wash. (2d) 557, 115 Pac. (2d) 667 (R. 11, 12).

The State Supreme Court was in error when it claimed the Twisp Company was estopped to question the illegal transactions of these appellees by reason of some claimed right for compensation for some expenditures they had made in order to proceed with their illegal undertaking, but this being an equitable action seeking an accounting from these illegal trespassers, there is no merit in the State Supreme Court's theory and this Court in *Guffy* v. *Smith*, 237 U. S. 101, 59 Law ed. 858, holds: That wilful trespassers are

not entitled to deductions like these appellees claim. Also see:

Pittsburgh, Etc. v. *Pentress, Etc.* (W. Va.) 100 S. E. 296.

Sweeney v. *Handley,* 126 Fed. (9th C. C. A.) 97.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the statutory provisions cited under heading "A" herein and the foregoing showing herein.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 213

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE FIRST NATIONAL BANK, ACTING AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Appellees.

ADDITIONAL AUTHORITIES IN SUPPORT OF THE JURISDICTION OF THIS COURT OF THIS APPEAL, WITH COMMENTS.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 Law Ed. 239, at 242, this Court held:

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but insisted that, as to the transaction in

question, the Kentucky Statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmance of its validity when so applied. * * *. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. * * *. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. *If it be resolved in favor of the validity of the statute, the review may be on writ of error, and if it be resolved against the validity, the review can only be by writ of certiorari.* The provisions take no account of the particular grounds or reasons upon which the decision is put." (Italics ours.)

Section 3803-11, Para. 1, of Rem. Rev. Statutes (Sup.) of the Uniform Business Corporation Act of the State of Washington went into full force and effect on January 1, 1934, and expressly provided:

"A corporation which has been formed under this act, or a corporation which existed at the time this act took effect, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purpose and which are not repugnant to law.*" (Italics ours.)

Section 3803-26, Para. 1, of Rem. Rev. Stat. (Sup.), provides:

"1. The shareholders of a corporation may make and alter by-laws not inconsistent with law and the articles of incorporation."

and Article V of the Articles on Incorporation of the appellant, Twisp Mining & Smelting Company, provides:

> "The powers of the corporation shall be exercised and its business shall be conducted by a Board of Seven Trustees."

and Section 3803-31, Para. 3, Subd. (d) of Rem. Rev. Stat. (Sup.), provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

The trial court and the State Supreme Court in this instant case were faced with the fact, that the Articles of Incorporation of the Twisp Mining & Smelting Company fixed its Board of Trustees, as a Board of Seven Trustees and therefore the law as applied to this corporation provided that there must be four trustees actually present at any meeting of that Board of Seven Trustees to legally transact any business of any kind of the Twisp Mining & Smelting Company.

The statute under the provisions of Section 3803-11. Para. 1, of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act, expressly provided that the Corporation had no power or authority to perform any act which was repugnant to law. Of necessity then, the Corporation had no power to enact any By-Law which was inconsistent with the Articles of Incorporation or the provisions of Section 3803-31, Para. Subd. (d), of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act.

Article 2, Sec. 6, of the By-Laws in question in this instant case provides:

> "A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the trans-

> action of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum be present."

It appears from this record that the Chelan Mining Company was organized on January 26, 1934, and that Robert H. Strong, James Cole and James O. Cull, became directors of that corporation, and on January 29, 1934, Robert H. Strong was elected its president and James Cole and James O. Cull were elected its assistant secretaries, and these three gentlemen were present at the purported special trustees meeting of the Board of Seven Trustes of the Twisp Mining & Smelting Company of date of January 30, 1934 (R. 7, 8 & 9).

It further appears from this record that James O. Cull, a director and assistant secretary of the Chelan Mining Company, advised Mr. Strong, Mr. Cole, and the three minority trustees present at that purported special meeting of the Board of Seven Trustees that the Board of Trustees of the Twisp Mining & Smelting Company at that time consisted of Seven Trustees but that there were two vacancies on the Board of Seven Trustees at that time (R. 10), and the record further shows that Mr. Cull construed the By-Law heretofore quoted herein to mean that:

> "A majority of the trustees then in office, constituted a quorum, and that the three minority trustees of the then Board of Seven Trustees could legally proceed to transact the business of the Twisp Mining & Smelting Company" (R. 10).

The State Supreme Court stated in its opinion (R. 18 & 19), that the Twisp Mining & Smelting Company, made the following assignment of errors on its appeal from the Judgment and Decree of the trial court, to-wit:

> "The trial court erred in holding that three members of a board of seven trustees, at an informal gather-

ing, legally represented the appellant; in holding in substance that those three trustees had power and authority to appoint an assistant secretary; in holding there was any by-law of appellant which in any way prescribed something different from that which is in the statute in regard to what constitutes a quorum; in assuming there was a legal special meeting of the board of seven trustees held on January 30, 1934; in further holding that those three trustees had any power or authority to pass a resolution of any kind which would be binding on appellant, and in not holding that the acts of those three trustees were ultra vires and absolutely void from their inception; and in holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed; * * *."

and the State Supreme Court in its opinion further states:

> "It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trustees, for the time being in office, shall constitute a quorum for the transaction of business, unless such by-law was in conflict with Rem. Rev. Stat. (Sup.) Section 3803-31, paragraph 111" (R. 36).

The State Supreme Court, in adopting that view, overlooked the fact that the Articles of Incorporation prescribed a Board of Seven Trustees, and that the statute provided that there must be a majority of that board, or four trustees, to constitute a quorum to transact business. There could not be a different board prescribed by any

By-Law for that is inconsistent with the Articles of Incorporation and law on the subject.

The State Supreme Court further states in its opinion:

> "It seems to us perfectly plausible and reasonable that a situation such as here presented was contemplated at the time the by-laws were passed. The next reference to Fletcher's Cyc. of Corporations is vol. 2, page 206, sec. 421, from which appellant quotes" (R. 37 & 38).

Fletcher's Cyc., on Corporations, Vol. 2, page 206, Section 421, provides:

> "The general • • • rule being the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is the majority of the entire board, notwithstanding there may be vacancies at the time." Hotaling *v.* Hotaling (Cal.) 224 Pac. 435, then the State Supreme Court further stated:
>
> "This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide "That a majority of the directors shall be necessary and sufficient to constitute a quorum," *not a majority of the trustees then in office, as in the instant case*" (R. 38). (Italics ours.)

Again the State Supreme Court overlooked the undisputable fact, that the Articles of Incorporation provided for the Board of Seven Trustees. Since the statute provided that a quorum must be present to do business there must be at least four trustees present to constitute a quorum, and under Section 3803-11, Para. 1, *supra*, the corporation had no power or authority to pass any by-law that was repugnant to law, and Section 3803-37, Section 3803-38 of Rem. Rev. Stat., (Sup.), of the Uniform Business Corporation Act provides that the Articles of Incorporation can only be amended by a resolution of the stock-

holders after that resolution is duly filed with the Secretary of State and a certificate of amendment issued by the Secretary of State. That was not done in this instant case. See, *in re Dolgeville*, 160 N. Y. 500, 55 N. E. 287, where that question was passed upon, and the court held:

> "The statutory provisions regulating the increase or decrease of directors of a corporation required the calling of a meeting of the stockholders, and authorized the determination of the question by a vote of those owning a majority of the stock and provided that "The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof, verified by the president and secretary of the meeting, shall be filed in the office where the original certificate of incorporation were filed." After careful examination of the origin and history of the statute, and due consideration of the object which the legislature aimed to accomplish by the several steps which it required shall be taken to effectuate an increase or reduction in the number of directors, we have concluded that it must be held that the number of directors of the Dolgeville Electric Light & Power Company was not reduced until after the filing of the transcript of the minutes of the corporation with the Secretary of State and the County Clerk, and as that was not done until after these proceedings were instituted it follows that the petition presented to the Court was not signed by a majority of the directors, and therefore the Court was without jurisdiction to make any order in the premises."

It is clear then, that the controlling authority of Article 2, Section 6, of the By-Laws was in violation of the Uniform Business Corporation Act and that the decision made based upon said violation of the State law deprived the stockholders of their property without due process of law. This is repugnant to the provisions of the 14th Amendment of the Constitution of the United States.

That construction placed the By-Law on a higher level than the Articles of Incorporation and law governing this instant case, and deprived the appellant corporation and its stockholders of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

In other words, the State Supreme Court assumed legislative power to repeal the provisions of the Uniform Business Corporation Act, by giving authority to a By-Law providing that a majority of the trustees then in office shall constitute a quorum for the transaction of business of the appellant corporation in excess of its power so to do, and its act in so doing was repugnant to the provisions of the 14th Amendment to the Constitution of the United States and resulted in depriving the stockholders of the appellant corporation of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States and of the equal protection of the provisions of the Uniform Business Corporation Act of the State of Washington.

Section 3803-11, Para. 1, of Rem. Rev. Stat., (Sup.), expressly provides that no corporation of the State of Washington has any power or authority to perform any act which is repugnant to law, and when the Articles of Incorporation fixed the number of the Board of Trustees of the appellant corporation and the law fixed that there shall be a majority of the Board present to constitute a quorum to do business, it means that the entire Board of Seven Trustees must be present to transact any business of the Twisp Mining & Smelting Company. This corporation, by the law under which it obtained its charter, had no power or authority to pass any by-law that was in conflict or inconsistent with its Articles of Incorporation and Section 3803-31, Para. 3, subd. (d) of the Uniform Business Corporation Act, and the attempt to do an act in excess of the

corporate power constituted an *ultra vires* act under the authority of *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24, 35 Law ed. 55, and therefore the attempted transaction of Chelan Mining Company, a corporation, with the minority trustees was absolutely null and void from its inception.

It is manifest, when one stops to think, if a corporation has the power to prescribe its own laws through its By-Laws there would be no necessity for the State to pass any laws on the subject, and likewise the State Supreme Court has no power to repeal any law of the State of Washington, and appellant respectfully submits that this instant case falls within the provisions of Section 237 (a) of the Judicial Code of the United States and this Supreme Court of the United States has jurisdiction of this appeal of this instant case.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
Attorneys for Appellant.

We, the undersigned attorneys for appellees, do hereby acknowledge receipt of a copy of the above Additional Authorities In Support of the Jurisdiction of the Supreme Court of the United States of this appeal:

DILLARD & POWELL,
Attorneys for Appellee, Seattle First National Bank, acting through its Spokane & Eastern Branch, as Receiver for Alder Group Mining & Smelting Company, a defunct corporation.

Date of service July 8, 1943.

CHAS. A. JOHNSON,
Attorney for Appellee, Chelan Mining Company.

Date of service July 10, 1943.

ADAM W. GILLESPIE,
Attorney for Appellee, Methow Gold Corporation.

Date of service July 8, 1943.